

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
Nexstar Broadcasting, Inc.)	CSC-395
v.)	NAL/Acct. No. 06-4110-0001
Cable One, Inc.)	FRN# 0003-4743-27
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 17, 2005

Released: November 18, 2005

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) we find that Cable One, Inc. (“Cable One”) apparently violated Section 76.92(a) of the Commission’s rules by willfully and repeatedly carrying network programming subsequent to its receipt of notification of network nonduplication protection as more fully discussed herein.¹ In this regard, Section 76.92 of the rules requires that, upon notification pursuant to Section 76.94 of the Commission’s rules, a cable operator must provide network nonduplication protection to a television broadcast station that holds the rights to that programming and in whose geographic zone the cable system is located in whole or in part.² It appears that Cable One apparently failed to provide network nonduplication protection to Nexstar Broadcasting, Inc., licensee of television broadcast station KSNF (NBC, Ch. 16), Joplin, Missouri (“KSNF”), after appropriate notification.

II. BACKGROUND

2. In its complaint, KSNF states that, on December 31, 2004, its existing retransmission consent agreement with Cable One expired and carriage of its signal on Cable One’s system ceased.³ Subsequently, KSNF sent Cable One a letter in March 2005 requesting that it provide the station with network nonduplication protection against television broadcast station KJRH (NBC, Ch. 2), Tulsa, Oklahoma (“KJRH”) on Cable One’s systems located within KSNF’s 35-mile zone of protection.⁴ On March 16, 2005, Cable One acknowledged the request and stated that it would comply no later than

¹47 C.F.R. § 76.92(a).

²*Id.*; see also 47 C.F.R. § 76.94.

³Complaint at 1.

⁴*Id.* at 2.

May 16, 2005.⁵ KSNF maintains that, when it was clear that the Commission would not grant Cable One's network nonduplication waiver prior to May 16th Cable One submitted a petition for market modification, seeking to include its communities within KJRH's DMA.⁶ As a result, KSNF states that Cable One did not begin providing the promised network nonduplication protection. Instead, Cable One claimed that it was prohibited by statute from deleting any programming from KJRH during the pendency of the market modification petition.⁷ KSNF argues that Cable One's contention ignores the plain meaning of Section 534(h)(1)(C)(iii) of the Act, which states that "a cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding" related to market determinations, and disregards Section 534(b)(3)(B) of the Act, which requires that "a cable operator shall carry the entirety of the program schedule of any television station. . . unless carriage of specific programming is prohibited, and other programming authorized to be substituted. . .".⁸ KSNF states that it was contrary to the public interest to permit Cable One to ignore Commission precedent and violate KSNF's nonduplication rights during the period in which when there had been no waiver of the rule. KSNF therefore requests that the Commission order Cable One to come into immediate compliance with the network nonduplication rules and also impose sanctions on Cable One for its continuing, willful and deliberate violation.⁹

3. In its response to KSNF's complaint, Cable One's contends that both the letter and spirit of Section 614(h)(1)(C)(iii) of the Act dictate that it was required to maintain the *status quo* by continuing to carry KJRH's signal intact.¹⁰ Cable One states that the purpose of the rule is to protect a viewer's access to a station's programming pending a determination of the station's status.¹¹ Cable One argues that, even if the Commission finds it in violation of the rules, there is no basis for sanctions as it would comply with any resulting final orders.

III. DISCUSSION

4. It is undisputed that, in March 2005, KSNF sent Cable One a request for network nonduplication protection and that this request was acknowledged by Cable One on March 16, 2005. Despite its commitment to commence such protection by May 16, 2005, Cable One inappropriately sought to rely on Section 614(h)(1)(C)(iii) of the Act to deny network nonduplication protection to station KSNF.

5. The market modification process outlined pursuant to Section 614 of the Act stays any action by a cable system with regard to a station's must carry status, but does not stay a cable system operator's obligation to provide network nonduplication protection where required. Pursuant to Section 76.92(a) of the Commission's rules, Cable One was obligated to provide KSNF network nonduplication

⁵*Id.* Cable One filed a petition for a waiver of the network nonduplication rules on April 28, 2005 (CSR-6711-N).

⁶*Id.* at 2-3.

⁷*Id.* at 3, citing Market Modification petition at n.37.

⁸*Id.* at 3, citing 47 U.S.C. § 534(h)(1)(C)(iii) and 47 U.S.C. § 534(b)(3)(B).

⁹We note that, in a letter dated September 22, 2005, Cable One notified the Commission that, as of September 21, 2005, it had begun providing KSNF network nonduplication protection against KJRH.

¹⁰Opposition at 4, citing 47 U.S.C. § 534(h)(1)(C)(iii).

¹¹*Id.* at 4-5.

protection against KJRH within sixty days of the request. It is undisputed that Cable One failed to provide this protection between May 17 and September 21, 2005, when it notified the Commission that it had begun providing protection to KSNF.

6. The Commission has clearly delineated the requirements for responding to requests for network nonduplication protection. Section 76.92(a) of the Commission's rules requires a cable operator, upon notification pursuant to Section 76.94 of the rules, to provide network nonduplication protection to a station in whose 35-mile geographic zone it is located in whole or in part.¹² Contrary to Cable One's contention, Section 614(h) of the Act does not alleviate a cable operator's obligation to comply with the Commission's other rules such as its mandatory carriage rules. The record shows that Cable One apparently failed to provide KSNF network nonduplication protection between May 17 and September 21, 2005.

7. Section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), provides that any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.¹³ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed. The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person violated the Act or a Commission rule. As we set forth in greater detail below, we conclude under this procedure that Cable One is apparently liable for a forfeiture in the amount of \$20,000 for its apparent willful and/or repeated violation of Section 76.92(a) of the Commission's rules.

8. Based upon the evidence before us, we find that Cable One apparently violated Section 76.92(a) of the Commission's rules by willingly¹⁴ and/or repeatedly failing to provide requested network nonduplication protection to KSNF. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,500 for violation of the cable broadcast carriage rules.¹⁵ While the *Forfeiture Policy Statement* does not specifically set out an amount for violations of the Commission's network

¹²47 C.F.R. §§ 76.92(a) and 76.94.

¹³47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. § 1.80(a)(1); 47 U.S.C. § 503(b)(1)(d) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, 16 FCC Rcd 1359 (2001) ("*Callais*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting*, 6 FCC Rcd at 4388; *Callais*, 16 FCC Rcd at 1362.

¹⁴See *supra* n.13 (discussing the Section 312(f)(1) definition of the term "willful").

¹⁵The Commission's *Forfeiture Policy Statement and Amendment of Section 1.89 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997); *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

nonduplication rules, we believe that such violations fall within the category set out for violations of the cable broadcast carriage rules. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act,¹⁶ which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require. After considering the record, the factors listed above and the *Forfeiture Policy Statement*, we believe that a proposed forfeiture in the amount of \$20,000 is appropriate in this case. Cable One's failure to provide the requested protection, its egregious act of essentially unilaterally granting itself a network nonduplication waiver, the length of the violation, and the substantial harm to KSNF's network nonduplication rights warrant the proposed forfeiture in excess of the base amount.

IV. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹⁷ and Sections 0.111, 0.283, and 1.80 of the Commission's rules,¹⁸ that Cable One, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Twenty Thousand Dollars (\$20,000) for willfully and repeatedly violating Section 76.92(a) of the Commission's rules.¹⁹

10. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Cable One, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

12. The response, if any, must be mailed to Ronald Parver, Federal Communications Commission, 445 12th Street, S.W., Room 4-A822, Washington, DC 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the

¹⁶47 U.S.C. § 503(b)(2)(D).

¹⁷47 U.S.C. § 503(b).

¹⁸47 C.F.R. §§ 0.111, 0.283 and 1.80.

¹⁹Consistent with Section 503(b) of the Act and Commission practices, for purposes of the forfeiture proceeding initiated by this NAL, Cable One, Inc. shall be the only party to this proceeding.

respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

14. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰

15. **IT IS FURTHER ORDERED** that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Cable One, Inc., 1314 N. 3rd Street, 3rd Floor, Phoenix, Arizona 85004, Attention: Thomas O. Might, President; to counsel for Cable One, Inc., Seth A. Davidson, Esq., Fleischman and Walsh, LLP, 1919 Pennsylvania Avenue, N.W., Suite 300, Washington, D.C. 20006; and to counsel for Nexstar Broadcasting, Inc., Howard M. Liberman, Esq., Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Donna Gregg
Chief, Media Bureau

²⁰See 47 C.F.R. § 1.1914.